BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF CHESAPEAKE UTILITIES CORPORATION REGARDING ITS ACQUISITION AND CONVERSION OF PROPANE COMMUNITY GAS SYSTEMS (Filed June 29, 2018)	**)**	**PSC Docket No. 18-0933**

REPLY MEMORANDUM IN SUPPORT OF THE PETITION OF THE DELAWARE ASSOCIATION OF ALTERNATIVE ENERGY PROVIDERS, THE MID-ATLANTIC PROPANE GAS ASSOCIATION, AND THE MID-ATLANTIC PETROLEUM DISTRIBUTORS ASSOCIATION FOR LEAVE TO INTERVENE

Pursuant to 26 *Del. Admin. C.* §2.9 (Public Service Commission Rules of Practice and Procedure), the Delaware Association of Alternative Energy Providers, the Mid-Atlantic Propane Gas Association, and the Mid-Atlantic Petroleum Distributors Association (collectively the "Associations" or "Petitioners") submit this reply memorandum in support of their petition for leave to intervene as parties in the above-captioned docket filed by Chesapeake Utilities Corporation ("CUC"). The Associations incorporate by reference herein their recently filed Public Comments in order to limit the repetition here of arguments made in that filing.

A. The Associations' Petition to Intervene Meets the Good Cause Standard for a Late-Filed Petition. Granting Leave to Accept the Filing of the

Petition Will Not Harm or Prejudice CUC, the DPA, or Any Other Party.

In PSC Order No. 9254 (July 24, 2018), which opened this proceeding, the Commission stated that petitions to intervene filed after the August 17, 2018 deadline would be granted provided that good cause is shown. On page 11, paragraph 18 of their Petition, the Associations acknowledged that the good cause standard applied, and argued that the meaning of "good cause" as interpreted in the reported opinion of *Kaiser-Frazer Corp. v. Eaton*, 101 A.2d 345, 351 (Del. Super. 1953) should govern the Commission's determination of the meaning of "good cause" here.

In *Kaiser-Frazer*, the eminent Delaware jurist, Judge Daniel Herrmann (later Chief Justice of the Delaware Supreme Court), found that the term "good cause" in a Delaware statute relating to the re-opening of a default judgment was "simply a restatement of the court's inherent, common law power to open a default judgment if … the court is 'convinced that it would be in furtherance of justice to do so.'" *Id*. at 351. And Judge Herrmann observed that the decision was a matter left to the court's sound discretion. *Id*. at 353. Applying the "good cause" standard, he determined to reopen the default judgment, even though: a) the defendants knew of the litigation well in advance of the default judgment; b) the defendants consciously decided to allow the default judgment to be taken against them; c) substantial proceedings had taken place in the Superior Court before and after the

entry of the default judgment, including a jury inquisition which resulted in judgment in excess of $3 million against the defendants; d) the plaintiffs had executed upon the judgment against the defendants assets; e) the action had been pending for more than eight months; and f) more than four months had passed since the defendants had appeared specially.

Like the Superior Court, the Commission has inherent authority over its own docket. The Commission may, in its sound discretion, grant the Association's petition, if it would serve the interest of justice. It does.

The Associations, their members (including the employees of members), and their customers have a direct interest in this action. As set forth in CUC's opposition to the motion to dismiss filed by the Staff and the Division of the Public Advocate ("DPA"), CUC's application here goes far beyond the issues typically presented in a natural gas rate case. It is an attempt to have the Commission re-write public utility law by asserting jurisdiction over previously unregulated propane gas rates and propane distribution systems. And as the Associations argued in their Public Comments, CUC seeks a decision about Commission jurisdiction that applies not only to community propane gas systems operated by its Sharp Energy, Inc. affiliate, but also to the propane systems operated by their members. We submit that the Commission should not undertake to decide the

scope of its jurisdiction over the propane industry without hearing from the industry representatives of propane providers in Delaware.

The filings made in this docket by the parties and the Associations demonstrate that this proceeding raises significant issues of first impression under Delaware public utility law. A Commission decision on Chesapeake's application could affect the propane industry and propane customers in Delaware for decades to come. Thousands of those propane customers are served by the members of the Associations, and not by Sharp Energy or CUC. Depending upon the outcome of this proceeding, an industry that heretofore has never been subject to the Commission's jurisdiction may suddenly find itself regulated to a significant degree. Given the issues presented here, the interest of justice inquiry cannot be limited to the views of CUC. The Commission should consider the interests of any person who might be affected. Undeniably, the persons most greatly affected include the Associations, their members, and their customers.

Under the holding in *Kaiser-Frazer*, even if the Associations intentionally chose not to file a petition to intervene until discovery had taken place, a hearing held, and these proceedings had advanced far beyond the motion to dismiss stage, their application to intervene should be granted under the good cause standard. Therefore, the focus should not be on the relatively brief two-month period between the August 17, 2018 intervention deadline and the filing of the

Associations' petition on October 11, 2018. Diligence is only one, secondary factor in making an interest of justice determination. And we submit that the Assocations have been reasonably diligent as a matter of law and fact, as we will now demonstrate.

When the Commission issued Order No. 9254 on July 24, 2018, the Delaware Association of Alternative Energy Providers ("DAAEP") simply did not appreciate the scope of what CUC was attempting to accomplish in this docket. Nor did it appreciate how it might affect the private, unregulated propane systems operated by its members. Apparently no one did.

In addition, just a year earlier, the Superior Court had issued an order finding that the Commission exceeded its authority when it granted a petition by the DAAEP to intervene in a CUC rate case. Around mid-September 2018, the DAAEP began to appreciate that this proceeding might have effects far beyond those associated with a typical natural gas rate case. The potential breadth of the proceeding began to crystalize when CUC, the DPA, and Staff agreed that they would brief a motion to dismiss, because CUC's application raised fundamental questions about the Commission's jurisdiction over private propane systems, their customers, and their propane rates.

It then became necessary to evaluate the potential effects of a Commission decision in this proceeding, and balance those effects against the backdrop of the

Superior Court's prior CUC Order, which erroneously sought to curtail the Commission's power over petitions to intervene. Furthermore, a consensus had to be reached, not only among the members of the DAAEP, but also the members of the other two Associations that ultimately decided to join the petition to intervene. Under the circumstances presented here, the Associations cannot be said to have unduly and willfully delayed filing their petition.

If the petition is denied for an alleged lack of good cause, the unfairness to the Associations, their members, and customers will be self-evident. It bears repeating that the Commission should not undertake to decide the scope of its regulatory authority over the propane industry, its providers, and its customers, without hearing from leading industry representatives, who can provide valuable input. To deny an entire industry and, by proxy, its propane consuming customers the opportunity to have their voices heard is contrary to the interest of justice.

Again considering the interest of justice, CUC must concede that this proceeding has not been delayed even a single day because the Associations did not file their intervention petition until October 11, 2018. Once they filed the petition, the Associations agreed to an expedited schedule to have it presented to the Commission on the same day that the Commission will hear the parties' pending motion to dismiss.

Another factor that might be considered in the interest of justice is harm or prejudice to CUC. *Kaiser-Frazer* at 354. CUC has not argued or demonstrated that it suffered any harm or prejudice because the petition to intervene was not filed until October 11, 2018. For its part, the Division of the Public Advocate ("DPA") agrees "that the Petitioners would bring a different perspective to the Commission that none of the existing intervenors can provide, and thus could provide the Commission with a more complete docket." DPA Opposition at 4. The DPA also acknowledges that this "case is still in the early stages, and there is no prejudice to the DPA or any other party." *Id*.

When it determines whether "good cause" exists to allow a late-filed petition, the Commission should give due consideration to the purpose of its deadline. *Compare Kaiser-Frazer* at 352. The purpose of the intervention deadline is to prevent delay and avoid harm and prejudice. Those factors do not exist here. Another purpose is to have an orderly proceeding. Given that there has been no delay, and the Associations' petition was filed at the initial stage of the proceeding before any discovery has taken place, the petition has not affected the orderly presentation and consideration of the issues raised by the docket. The good cause/interest of justice standard is not narrowly confined to or focused upon the issue of diligence. The focus of an interest of justice determination is one of substantive fairness. While making this point, the Petitioners nevertheless

appreciate the significance of Commission deadlines, and by their efforts to expedite this matter, have sought to demonstrate their respect for the Commission's orders and procedures.

The Commission should apply the "good cause" standard espoused by the Court in *Kaiser-Frazer*. We respectfully submit that the Commission may and should exercise its sound discretion to accept the Association's petition to intervene because it was less than two months beyond the deadline, and they have demonstrated that it will advance the interest of justice, as required by Commission Order No. 9254.

B. The Superior Court's June 17, 2017 Unreported Order in Chesapeake Utilities Corp. v. Delaware Public Service Commission Is Not Controlling Authority and Does Not Require the Commission to Deny the Associations' Petition to Intervene.

As the Associations established in their petition to intervene, the Superior Court's unreported Order of June 17, 2017 in *Chesapeake Utilities Corp. v. Delaware Public Service Commission* ("the CUC Order") is not a controlling precedent. It is a non-binding, unreported, advisory Order only, it is distinguishable, and it was incorrectly decided as a matter of law and fact. Furthermore, it is not a binding precedent because, under Delaware law, only reported decisions are binding under the doctrine of *stare decisis*.

Stare decisis is a Latin term meaning let the decision stand. Black's Law Dictionary (10th ed. 2014) defines *stare* decisis as

> [t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.
>
> In *State v. Phillips*, 400 A.2d 299, 308, the Court of Chancery held:
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> The prerequisites necessary for the application of the doctrine of stare decisis are: a judicial opinion by the court, on a point of law, expressed in a final decision. Generally the decision or opinion must also be reported.

See also Donovan v. Whitney, 1992 WL 1368643, *3 (Del. Ch. 1992)(To arise to the level of *stare decisis*, an opinion must be reported, citing *State v. Phillips*, *supra*, and other authorities).

The CUC Order is unreported and it does not constitute an opinion of the Court. It is an order only. As a matter of Delaware law, the unreported CUC Order does not qualify as binding precedent under the doctrine of *stare decisis*. However, while it does not constitute a binding precedent, the Associations never argued that the Commission should "***ignore***" the Order, as CUC contends. To the contrary, the Associations cited the CUC Order to the Commission, discussed it in detail, explained why it is not a binding precedent, and argued that the Commission should decline to follow it, because it was incorrectly decided as a matter of law and fact.

C. The Doctrine of *Res Judicata* Does Not Bar the Commission From Granting the Associations' Petition.

Res judicata is a Latin term meaning that a thing has been adjudicated. CUC's opposition correctly cites the five-part test under Delaware law for the application of *res judicata*. The CUC Order does not meet the test.

For *res judicata* to apply, the Superior Court was required to have jurisdiction over the subject matter and the parties that were encompassed by the CUC Order. However, the Petitioners have shown that the Superior Court did not have jurisdiction over the intervention issue. The underlying Commission proceeding was a disputed rate case. The disputed rate case was settled, and therefore resolved. If there was no disputed rate case, there could be no intervention dispute. It's that simple.

CUC argues that certain jurisdictions -- not Delaware -- allow settling parties to preserve an issue for appeal within a settlement agreement. Petitioners submit that the authorities cited by CUC can be readily distinguished. However, we need not occupy the Commission's time with an extensive examination of those case decisions. The unreported Delaware decision cited by CUC in footnote 6 of its opposition, *Maddox v. Justice of the Peace Court No. 19*, 1991 WL 215650 (Del Super., Sept. 24, 1991), is apparently the only Delaware case to address the issue head on, and it unequivocally rejected the argument that CUC advances here. *Maddox* arose out of a landlord/tenant dispute. CUC concedes that the Superior Court in *Maddox* ruled against the argument CUC makes here and held that an

appeal does not lie from a consent judgment. In doing so, the Court cited numerous authorities from other jurisdictions as persuasive, and decided to follow them. After the Superior Court issued its decision, the case was returned to the Delaware Supreme Court. *Maddox v. Justice of the Peace Court No. 19*, 604 A.2d 418 (Del. 1991)(Table). Exhibit A hereto. In its order dismissing the appeal as moot, the Supreme Court panel noted that the appellant conceded she was no longer a tenant of the landlord/appellee, and thus there was no real dispute, and therefore no jurisdiction over the appeal because of mootness.

CUC concedes that the other unreported Delaware case it cites, *Service Corp of Westover Hills v. Guzzetta*, 2011 WL 3307921 (Del. Ch. 2011) at best addresses the subject in *dicta*. Petitioners submit that a close reading of the *Guzzetta* decision sheds no light on the subject, and merely holds that parties to a proceeding may stipulate to the amount of damages.

While it is not bound by the *Maddox* decision, we respectfully submit that the Commission need not engage in an extensive review of the case law on the appealability of consent judgments. Instead it should simply adopt the well-reasoned decision of the Superior Court in *Maddox*, and conclude that the parties to the CUC order could not appeal from the consent judgment settling the rate case that was the core dispute before the Commission. Hence, the Superior Court lacked jurisdiction over the CUC Order, the appeal, and the parties.

The CUC Order fails to meet another part of the *res judicata* test, namely, that the issue decided in the CUC appeal is identical to the issue presented here. The issues at stake are not identical. The rate case underlying the CUC Order did not involve an issue of first impression about whether the Commission can assert jurisdiction over propane distribution systems, propane rates, and the provision of service to propane customers. Among other things, CUC is asking the Commission in this proceeding to rule that it has the power to regulate propane providers, whether they are public utilities or private, unregulated companies. The CUC Order was not issued in the context of such a proceeding.

Delaware courts will find an identity of issues for *res judicata* purposes only when the same transaction formed the basis for both the present and former suits. *Gamco Asset Management Inc. v. iHeartMedia Inc*., 2016 WL 6892802 (Del. Ch. 2016) Exhibit B hereto. The case presently before the Commission involves CUC's decision to convert the forty-plus community propane gas systems owned by its Sharp Energy affiliate. In connection with its application, CUC asks the Commission to determine for the first time that it has jurisdiction to regulate propane distribution systems, propane appliances, propane rates, and the provision of service to propane customers. CUC's argument necessarily applies to the propane systems operated by private companies. None of these issues were before the Commission in in the prior CUC rate case. CUC concedes that the issues

raised by its application here are matters of first impression, and therefore could not have been part of, or resolved in, the earlier docket.

It is true that one motivation for the Petitioners to intervene is to protect their economic and competitive interests. However, this is not a typical rate case in which the issues before the Commission are strictly limited to natural gas rates. At the heart of CUC's application is its desire to operate forty-plus community propane gas systems for years, while it attempts to convert them to natural gas. In making its arguments, CUC seeks to have the Commission rule that it has jurisdiction over any propane system, even those operated by a private company, where the operator intends to convert the system to natural gas.

The CUC Order fails to meet a third prong of the *res judicata* test, that the decree in the prior action was a final decree. The CUC Order simply is not a valid, binding precedent.

CUC argues that *res judicata* can be applied to the parties to a prior proceeding and those in privity with those parties. It incorrectly contends that MAPGA and MAPDA were in privity with DAAEP for purposes of the prior proceeding which lead to the CUC Order, and therefore they are bound by the Order. CUC's argument is flawed both legally and factually. And CUC has the burden of proving the applicability of *res judicata* an had failed to meet that burden. *Cavalier Oil Corp. v. Hartnett,* 564 A.2d 1137, 1141 (Del. 1989).

CUC relies upon the Court of Chancery's decision in *Aveta, Inc. v. Cavallieri,* 23 A.3d 157, 180 (Del. Ch. 2010). In *Aveta*, the Court made a general statement about the principles generally applicable to privity, but never decided the issue. Instead, citing precedent and the Restatement (Second) of Judgments, the Court urged that caution be used when attempting to apply privity in a res judicata setting:

> Haphazard use of the term "privity" can lead to improper findings of preclusion. This is so because the term, except in reference to specific legal relationships, "is so amorphous that it often operates as a conclusion rather than an explanation." In the preclusion analysis, even a legal relationship such as husband and wife "does not [alone] justify imposing preclusion on one of them on the basis of a judgment affecting the other." Rather, "preclusion can properly be imposed when the claimant's conduct induces the opposing party reasonably to suppose that the litigation will firmly stabilize the latter's legal obligations." (Citations omitted.)

The CUC Order cannot conceivably meet the requirements for preclusion based upon privity set forth in the preceding quote from *Aveta*. There is no showing that there is any legal relationship whatsoever between DAAEP on the one hand and MAPGA and MAPDA on the other hand. And it would stretch the law of privity beyond all bounds to say that when any industry association in the United States litigates an issue, that every other industry association having a similar group of members is automatically bound by the outcome. Simply stating the point exposes its flawed logic.

There is no showing (and no basis on which to believe) that the MAPGA and the MAPDA induced CUC to reasonably suppose that they would be bound by the CUC Order. They were not parties to the docket, made no attempt to intervene, and there is no showing that they were even aware that the Superior Court would address the moot issue of whether the DAAEP could be granted leave to intervene.

More importantly, the intervention issue confronted by the Superior Court in the CUC Order is not remotely comparable to the intervention issue here. In this proceeding the Commission is being asked to rule upon its jurisdiction over propane providers. The same issue was not before the Superior Court in the prior Commission appeal. And no one could have reasonably expected that the CUC Order would preclude an independent association of propane providers from intervening in this proceeding given the scope of the issues presented here, which were not present in the prior docket.

Two parties are in privity where the relationship between two or more persons is such that a judgment involving one of them may justly be conclusive on the others, although those others were not party to the lawsuit. *Higgins v. Walls*, 901 A.2d 122, 138 (Del. Super. 2005). Thus, a finding of privity turns, in part, on whether its application is just. It cannot be just to conclude that independent industry associations are bound by unreported Superior Court orders in proceedings in which they had no involvement. Such a holding has the potential to

wreak havoc on the Delaware business community and is contrary to sound public policy.

In their Petition, the Associations sought to make the point that parties cannot, by agreement, confer subject matter jurisdiction over a Court, citing *El Paso Natural Gas Co. v. Transamerican Natural Gas Corp*., 669 A.2d 36, 39 (Del. 1995), *overruled on other grounds*, *National Industrial Group (Holding) v. Caryle Investment Management LLC,* 67 A.3d 373, 385 (Del. 1995). CUC concedes the correctness of this principle, but argues incorrectly that did not happen when the Superior Court considered the CUC Order.

Petitioners agree that the Superior Court generally has subject matter jurisdiction over appeals from Commission decisions. However, that only holds true when there is an actual underlying case decision for the Superior Court to consider. The Superior Court cannot assume jurisdiction to decide a tangential issue in a Commission rate case, when the rate case itself, which serves as the basis for Commission jurisdiction in the first place, was settled by a consent order, leaving only the hypothetical question whether a particular party should have been permitted to intervene.

El Paso and *Carlyle* do not support CUC's position here. Those cases addressed the enforceability of a forum selection clause where the parties had a substantial, concrete underlying dispute. The Supreme Court did not decide

whether forum selection clauses are enforceable as an abstract principle of law in those two cases. And the Delaware Supreme Court and the parties would not have spent their time and resources addressing the enforceability of the forum selection clauses at issue unless there was an underlying dispute to be resolved. In the case of the CUC Order, the underlying rate case was resolved leaving no underlying controversy to resolve and rendering the intervention issue moot. If there is no rate case, there is no proceeding in which to intervene, and no reason for the DAAEP to be heard.

D. The Petition Satisfies Both Prongs of the Commission's Intervention Rule.

With all due respect to the experience and capabilities of the Commission Staff and the DPA, the Petitioners interests cannot be adequately protected without their participation in this proceeding. This is a common sense determination. The Staff is charged with assisting the Commission in making legally correct and proper case decisions. The DPA is charged with protecting the interests of the public and ratepayers generally. Neither is charged with protecting the specific interests of private, unregulated companies or their energy customers. The DPA agrees that the Petitioners can provide the Commission with unique insights that would provide a more complete record for decision-making.

In their petition to intervene, their Public Comments, and in this reply, the Petitioners have made the case that their participation would serve the public

interest. The "public" in the term "public interest" is necessarily broad. The public includes the Associations, their members, their Delaware employees, their customers, and other current and potential alternative energy providers and consumers. It does not advance the public interest to reject the petitions of persons, including industry associations, with a major stake in the issues raised by a public proceeding which will end with a case decision. Lastly, it is ironic for CUC to argue here for the principle that all propane-related industry associations (and presumably their members) should be bound by the outcome of a Commission natural gas rate case, if even one association participates, and at the same time contend that they have no standing to intervene.

Wherefore, the Petitioners respectfully request that they be granted leave to intervene in this proceeding as parties for all purposes.

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